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ACTION: Notice of Decision on Request for Reconsideration of Determination on Petition to Adopt Regulations

SUBJECT: Petition by Salvatore D'Anna requesting adoption of regulations re HIPAA

PETITIONER

Salvatore D'Anna's request for reconsideration (Request) of the decision by the Department of Managed Health Care (Department) regarding the petition for rulemaking action (Petition) was received by the Department on March 25, 2008. Pursuant to the requirements of Government Code section 11340.7, the Department provides this response to the request for reconsideration.

CONTACT PERSON

Inquiries concerning this decision may be directed to Emilie Alvarez, Regulations Coordinator, Department of Managed Health Care, Office of Legal Services, by mail at: 980 9th Street, Suite 500, Sacramento, CA 95814, by telephone at: (916) 322-6727, or by e-mail at: ealvarez@dmhc.ca.gov or regulations@dmhc.ca.gov.

AVAILABILITY OF PETITION

The petition for the adoption of regulations is available upon request directed to the Department's Contact Person.

AUTHORITY

Under authority established in the Knox-Keene Act¹, including but not limited to sections 1343, 1344 and 1346, the Department of Managed Health Care (Department) may adopt, amend and rescind regulations as necessary to carry out the provisions of the Act.

DETERMINATION ON THE REQUEST FOR RECONSIDERATION

Introduction

On February 25, 2008, Salvatore D'Anna submitted a Petition requesting that the Department initiate rulemaking action to adopt a regulation "to require disciplinary action against any health plan that violates the Privacy Protections of [HIPAA]." The Health Insurance Portability and Accountability Act (HIPAA) is federal law that establishes standards for ensuring the confidentiality of personal medical information.

¹ Health and Safety Code section 1340 *et seq.* References herein to the "Act" are to the sections of the Knox-Keene Act.

Pursuant to Government Code section 11340.7, and for the reasons stated in its decision issued March 24, 2008, the Department denied the Petition. As noted above, on March 25, 2008, Mr. D'Anna requested reconsideration. After considering the Request for Reconsideration, the Department has determined to affirm its denial of the Petition.

Determination

The Request for Reconsideration states that the Department's decision on the Petition should:

“...take into account that the Legislature (through the California Health Insurance Portability and Accountability Implementation Act, Health & Saf.C. § 130300 et seq.) has directed the California Health and Human Services Agency to determine (by January 1, 2008) which state laws are preempted by HIPAA (pursuant to 45 CFR § 160.2043), at which time those provisions will be repealed. (See Health & Saf.C., § 130311.5).”

The Department has determined that the preemption analysis performed by the California Office of HIPAA Implementation (OHI) does not warrant modification of the determination on the Petition.

Section 130311.5 of the Health and Safety Code (hereinafter Section 130311.5) provides:

- (a) The office shall assume statewide leadership, coordination, direction, and oversight responsibilities for determining which provisions of state law concerning personal medical information are preempted by HIPAA pursuant to Section 160.203 of Title 45 of the Code of Federal Regulations. State entities impacted by HIPAA shall, at the direction of the office, do the following:
 - (1) Assist in determining which state laws concerning personal medical information are preempted by HIPAA.
 - (2) Conform to all determinations made by [OHI] concerning HIPAA preemption issues.
- (b) Any provision of state law concerning personal medical information that is determined by [OHI] to be preempted by HIPAA pursuant to Section 160.203 of Title 45 of the Code of Federal Regulations, shall not be applicable to the extent of that preemption. The remainder of the provisions of state law concerning personal medical information shall remain in full force and effect.

The OHI (established in the Health and Human Services Agency) has posted the preemption analysis required by Section 130311.5 on the OHI web site at:

http://www.ohi.ca.gov/state/calohi/ohiGeneral.jsp?sCat=/Nav/Legal%20Issues#legal_completed_preemption_analyses_of_state_privacy_laws

The OHI preemption analysis of Civil Code section 56.10 is posted to the OHI web site at: http://www.ohi.ca.gov/calohi/docs/CMIA_PA_05_update.doc

The OHI preemption analysis of selected provisions of the Knox-Keene Act is posted to the OHI web site at: http://www.ohi.ca.gov/calohi/docs/10.17.05_knox.keene_preemption_analysis.doc

The OHI preemption analysis of the Knox-Keene Act does not identify for preemption Section 1386, subdivision (b), of the Health and Safety Code (hereinafter Section 1386 of the Knox-Keene Act), which requires health plans to comply with the requirements of Section 56.10 of the Civil Code. If one or more requirements of Section 56.10 of the Civil Code are preempted by HIPAA, then pursuant to Section 1386 of the Knox-Keene Act, health plans must still comply with the requirements that are not preempted, and all applicable requirements of HIPAA.

As explained in the Department's determination on the Petition, the Department does not promulgate regulations to clarify provisions of law that: are outside the Knox-Keene Act; are unnecessary to clarify, implement or make specific a statute within the Knox-Keene Act; or are duplicative of other law. Accordingly, the Department's previously issued decision on the Petition is not modified.